No. 88-7146

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JONAS H. WHITMORE,
Individually and as "Next Friend"
of RONALD GENE SIMMONS,

Petitioner,

vs.

STATE OF ARKANSAS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF AMICI CURIAE BY THE STATE OF MISSOURI, joined by the States of ALABAMA, IDAHO, NEW MEXICO, OHIO, SOUTH CAROLINA and VIRGINIA

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QUESTIONS PRESENTED

I.

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES A MANDATORY APPELLATE REVIEW IN ALL CASES IN WHICH THE DEATH PENALTY IS IMPOSED?

II.

WHETHER A THIRD PARTY HAS STANDING TO ASSERT THE VIOLATION OF CONSTITUTIONAL RIGHTS WHEN THE PARTY DIRECTLY AFFECTED DOES NOT ASSERT THE RIGHT? (AMICI WILL ADDRESS ONLY THIS QUESTION.)

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INTEREST OF AMICI CURIAE

The states listed in the Appendix, by and through their respective Attorneys General, respectfully offer this brief as *amici curiae* in support of the position of the respondents in this cause. Since 1976, there have been fourteen "voluntary executions" which is over ten percent of the total number of executions. *See*, LDF, Death Row, U.S.A. 6-8 (July, 1989). All of the states joining in this brief have had, do have or may have in the future death-row inmates in state or federal court who wish to forego litigation. These states have had or will have people who oppose the death penalty attempt to litigate on behalf of those inmates.

The precise issue raised in the present cause either has arisen or may arise in all of these states. For this reason, amici have a substantial and continuing interest in the cases such as the one at bar.

SUMMARY OF THE ARGUMENT

Since *Gilmore v. Utah*, 429 U.S. 1012 (1976), the federal courts have periodically been asked to decide whether intervenors who want to litigate on behalf of inmates who wish to abandon appeals have standing to litigate on behalf of those death-row inmates. Petitioner Whitmore suggests that he has standing to litigate the present petition for writ of certiorari on an "individual standing" theory and "third-party standing" theory. Whitmore, however, fails to demonstrate either form of standing. Since Whitmore suffers no injury-in-fact from Simmons' execution, he has no individual standing. Further,

Whitmore has no third-party standing since he does not show why Simmons cannot assert his own rights. Accordingly, this Court has no jurisdiction under Article III since there is no "case or controversy" before the Court. Finally, the judgment of the Arkansas Supreme Court rests on an adequate and independent state ground. Even if Whitmore has standing before the federal court under Article III, he had no standing in state court as a matter of state law.

ARGUMENT

In this brief, amici wish to speak only to the second question presented by Whitmore. Since *Gregg v. Georgia*, 428 U.S. 153 (1976), there have been fourteen "voluntary executions." *See*, LDF, Death Row, U.S.A. 6-8 (July, 1989). These executions have created almost as much litigation as nonvoluntary executions. *See, e.g., Gilmore v. Utah*, 429 U.S. 1012 (1976); *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir.), *cert. denied*, 473 U.S. 919 (1985). There is also much "next-friend" litigation that does not result in execution. *See, e.g., Smith ex rel. Missouri Public Defender Commission v. Armontrout*, 812 F.2d 1050 (8th Cir.), *cert. denied*, 107 S.Ct. 3277 (1987); *Weber v. Garza*, 570 F.2d 511 (1978); *Groseclose ex rel. Harries v. Dutton*, 594 F.Supp. 949 (M.D. Tenn. 1984). The issue of standing for one to proceed on behalf of a death-row litigant who wishes to abandon litigation has been or may be the subject matter of litigation involving amici.

Although Whitmore articulates and treats the standing issue as a secondary question, amici believe that it is

not a secondary issue, but rather, a threshold question that implicates this Court's Article III "case or controversy" jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968). If the Article III jurisdictional standard is met, there remains the issue of whether the Court should hear the suit "as a prudential matter." *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). If Whitmore has no standing before this Court, then the judgment of the Arkansas Supreme Court should be affirmed.

I. Whitmore cannot demonstrate that he has "next-friend," individual or third-party standing.

Whitmore's belief that standing is a secondary issue is reflected in his presentation of this issue to this Court. Before discussing Whitmore's imprecision in presenting the issue, it is necessary to discuss the difference between individual standing, "next-friend" standing and third-party standing.

Individual standing concerns the ability of Whitmore, as an individual, to challenge the lawfulness of Arkansas's capital procedure. Under individual standing, Whitmore is not asserting Simmons' constitutional rights. Rather, Whitmore attempts to assert his own personal challenge to the lawfulness of the Arkansas procedure due to an alleged injury to him from that procedure as applied to Simmons. An example of this individual standing was asserted but rejected in *Wilson v. Lane*, 870 F.2d 1250, 1254-1256 (7th Cir. 1989), *cert. pending*, No. 89-81 (U.S.). *See also, Franz v. Lockhart*, 700 F.Supp. 1005, 1010 (E.D.Ark. 1988), *appealed*, No. 89-1485EA (8th Cir.).

This Court recognized "next friend" standing with federal habeas corpus litigation in *Rees v. Peyton*, 384 U.S. 312 (1966). That form of standing is statutorily authorized by the Congress. 28 U.S.C. § 2242. With "next friend" standing, the "next friend" asserts the real party-in-interest's rights due to an inability of the real party-in-interest (the prisoner) to assert those rights for himself. In the habeas corpus litigation, that inability is usually litigated in the form of whether the prisoner is competent to litigate in his own behalf. *See, Lenhard v. Wolff*, 443 U.S. 1306, 1308 (1979) (Rehnquist, J., opinion in chambers); *Evans v. Bennett*, 440 U.S. 1301 (1979) (Rehnquist, J., opinion in chambers); *Smith ex rel. Missouri Public Defender Commission v. Armontrout*, 812 F.2d at 1050. In these "next friend" habeas corpus litigations, the "next friend" wishes to step into the shoes of the offender and litigate claims for the offender, subject to defenses asserted by the State.

Finally, Whitmore attempts to assert the rights of Simmons under a third-party standing theory (Brief, pp. 22-25). To assert third-party standing, Whitmore must show an injury-in-fact to himself from Simmons' failure to appeal and that it is prudential to allow Whitmore to proceed, *i.e.*, that Simmons is incapable of asserting his own rights. *Singleton v. Wulff*, 428 U.S. at 114, 116.

A. Whitmore alleges only individual and third-party standing, not "next-friend" standing.

Although the present case is styled "Jonas H. Whitmore, individually and as 'next friend' of Ronald Gene Simmons v. State of Arkansas," amici believe that the

standing issue is factually more complex than the mere caption of the present case. Accordingly, amici will trace the development of the present standing issue before the Arkansas Supreme Court and this Court. From this discussion, amici believe that it will become clear that Whitmore is asserting only individual and third-party standing before this Court.

Before the Arkansas Supreme Court, Whitmore, without gracing that court with any explanation, sought permission to proceed as Simmons' "next friend" (Joint Appendix – hereinafter "J.A." – at p. 32, para. 2) and asserted one theory of individual standing:

> Petitioner Jonas H. Whitmore is an interested party in that certain protected rights for both he [sic] and other present and future death row inmates are dependent upon further appellate review in behalf of Ronald Gene Simmons.

[J.A. p. 33, para. 5.] Whitmore did not assert a third-party standing theory (J.A. 32-33). The Arkansas Supreme Court denied the request to intervene due to Whitmore's lack of standing on March 13, 1989 (J.A. 34).

The petition for writ of certiorari to the Supreme Court of Arkansas made clear that the only judgment Whitmore wanted reviewed was the "judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on March 13, 1989, in which Whitmore was denied the right to intervene in [sic] behalf of Ronald Gene Simmons, an Arkansas inmate scheduled to die by lethal injection" (Petition for Certiorari – hereinafter "P.C." – at p. 1). Whitmore did not request the petition for certiorari to extend to the March 10, 1989 *per curiam*

opinion of the Arkansas Supreme Court (J.A. 29). Whitmore did not assert that he had "next friend" standing to proceed on behalf of Simmons (P.C. pp. 8-10). Likewise, in the opening brief, Whitmore fails to assert that he has "next friend" standing to proceed on behalf of Simmons (Brief pp. 20-25). The only theories of standing asserted to this Court are individual standing and third-party standing (P.C. pp. 8-10; Brief pp. 20-25). Whitmore's decision not to assert "next friend" standing is reasonable in light of *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988), and *Franz v. Lockhart*, 700 F.Supp. at 1005. Issues concerning the limitation of *Rees v. Peyton*, 384 U.S. at 312, are not before the Court.

B. Whitmore does not have individual standing or third-party standing to assert a petition for writ of certiorari from Simmons' conviction.

Whitmore asserts that he has individual standing to assert the present petition for writ of certiorari (Br. pp. 20-22). Whitmore also imports a variety of theories from civil law to support his third-party standing contention (Br. pp. 22-25). These civil-law theories of standing have never been applied by this Court to one's standing to assert a petition for writ of certiorari from a criminal direct appeal on behalf of another. Since none of Whitmore's theories is well founded, Whitmore's request should be denied.

1. Whitmore has no individual standing.

Initially, Whitmore recognizes that the federal courts do not consider "generalized grievances about the conduct of government" (Brief, p. 21, *quoting, Flast v. Cohen*, 392 U.S. at 106). Whitmore, however, goes on to assert such a generalized grievance (Brief, p. 21). Whitmore alleges that he is entitled to assert the "public interest protections of the Eighth Amendment" (Brief, p. 21). Of course, this is the type of generalized grievance that is insufficient to convey individual standing to Whitmore. Even one who feels strongly that another's rights are being ignored may not rely on the strength of feeling or sincerity of that conviction as a foundation for federal jurisdiction.

> Plaintiffs in the federal courts "must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." . . . There must be a "personal stake in the outcome" such as to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." . . . Abstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as a result of . . . official conduct.

O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (citations omitted).

Whitmore refers the Court to no case that recognizes such a "public interest protection" aspect to the Eighth Amendment (Brief, p. 21). That is because the Eighth Amendment's protections are not a salve for the public's

conscience concerning capital punishment. Rather, the Eighth Amendment protections are purely personal to the individual. Further, such a standard for individualized standing would allow "all other citizens of the state" (Brief, p. 21) to file certiorari petitions asserting a "public-interest protection" of the Eighth Amendment. The concept of "citizen standing" was rejected by this Court in *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 482-487 (1982). The anomaly of that theory would be illustrated if "citizens" were to file documents encouraging the courts to execute Simmons or waiving the purported public-interest protection. As should be apparent, problems arise where multiple "citizens" approach the Court. Further, problems would arise where the criminal defendant *and* "citizens" approach the court. Recognition of such a theory of standing would be unworkable at best, unconstitutional at worst.

Whitmore also asserts that he

> has a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be [sic] arbitrarily skewed by the omission of any other capital case.

[Brief, p. 21.] Although Whitmore does not grace the Court with an explanation of this sentence, amici assume that Whitmore is asserting that his proportionality review will not be accurate without inclusion of Simmons' crimes into the pool of comparative information (P.C. p. 10). This assertion ignores the fact that Whitmore's proportionality review has been completed by the Arkansas

Supreme Court, which affirmed Whitmore's death sentence. The Arkansas Supreme Court was persuaded that the multiple stabbing, the slicing of the throat and the engraving of an "X" into his victim's face thoroughly justified the circuit court's verdict of the death penalty. *Whitmore v. State*, 296 Ark. 308, 756 S.W.2d 890, 895 (1988). Whitmore's concern that Simmons' information will not be available for proportionality review is moot.

Perhaps, Whitmore speculates that some future court will reverse his conviction or sentence of death and Simmons' information will not be available for proportionality review of Whitmore if he is reconvicted and resentenced to the death penalty (P.C. p. 10). Such analysis is speculative and is hardly the foundation for an Article III "case or controversy." "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *O'Shea v. Littleton*, 414 U.S. at 494 (citations omitted); *see, Franz v. Lockhart*, 700 F.Supp. at 1010 (describing "injury" as too tenuous and contingent to confer standing). Further, amici note that Whitmore offers no reason why he cannot bring this purported flaw to the attention of the Arkansas Supreme Court in the unlikely event this scenario occurs.

Finally, amici note that the truth of Whitmore's argument would show a motive for him to sabotage an appeal brought on Simmons' behalf. Whitmore would want to paint Simmons as the most evil killer ever to live in the State of Arkansas. By painting Simmons in a bad light, Whitmore enhances the possibility that his own slaughter will be reviewed favorably to that of Simmons by a future Arkansas Supreme Court. Article III requires a case or controversy between parties. There appears to be none

between Whitmore and the State of Arkansas in the Simmons case as defined by the Constitution and this Court.

Whitmore next asserts that the Court should not enforce the standing requirement. Whitmore's rationale is that standing should be considered only a "rule of practice" (Brief, p. 21). Whitmore's argument is grounded in misperception. The standing requirement is grounded in this Court's Article III "case or controversy" requirement. The standing doctrine has jurisdictional underpinnings. *See, Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Once the minimum Article III standing requirement is met, there remains a standing requirement based on principles of prudence. *Id.; Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. at 474-475. Whitmore points to no case from this Court suggesting that there is an exception to the Article III standing requirement.

Whitmore grounds his suggested exception on the Eighth Amendment. That rationale is insufficient to create an exception to Article III.

> Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. at 489. There is no

principled method to limit exceptions to standing to certain constitutional provisions. *See, id.* at 489-490. Whitmore also suggests that if he has no standing, then a constitutional violation will go unredressed (Brief, p. 25). "This view would convert standing into a requirement that must be observed only when satisfied." *Id.* at 489.

2. Whitmore is not entitled to third-party standing.

Whitmore asserts that he is entitled to assert Simmons' rights under a third-party standing theory (Brief, pp. 23-25). Generally, third parties have no standing to assert claims on behalf of another. *See, Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. at 473; *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). An exception to this general rule exists. Initially, a third party like Whitmore must demonstrate a relationship between himself and the person whose rights he seeks to assert (Simmons).

> The first [element] is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Further, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

Singleton v. Wulff, 428 U.S. 106, 115 (1976). Amici find it significant that Whitmore fails to allege to the Arkansas

Supreme Court and this Court a relationship between Whitmore and Simmons. Whitmore fails to describe how he will enjoy vindication of Simmons' right. In fact, as discussed earlier (Amicus Brief, *supra* at p. 8), it might not be in Whitmore's interest to assert rights consistent with Simmons' rights. Whitmore might be interested in making Simmons look bad in order for Whitmore to look better in the unlikely event the Arkansas Supreme Court has to conduct another proportionality review.

Second, Whitmore fails to assert any reason for Simmons not to assert his own right before this Court.

> Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the person who is in court becomes[,] by default[,] the right's best available proponent.

Id. at 115-116. Simmons was and is his own best proponent. He was certainly available to vindicate his own rights before the Arkansas Supreme Court. He is available to present his position to this Court. This is best manifested by his presentation of his own amicus curiae brief. There is no "genuine obstacle" to Simmons' assertion of his own rights. He could have easily ratified the appeal to the Arkansas Supreme Court or to this Court. Considerations of privacy, *Singleton v. Wulff*, 428 U.S. at 117; imminent mootness, *id.*; fear of prosecution, *Craig v. Boren*, 429 U.S. 190, 196-197 (1976); or "chilled" expression, *Secretary of State of Maryland v. Joseph H. Munson Co.*,

467 U.S. 947, 956 (1984), do not apply here. No genuine obstacle barred Simmons from his direct appeal.

If the Court were to find that Whitmore has standing to assert the Eighth Amendment claim presented in question number one, it cannot be on the basis of third-party standing. If Whitmore wishes to assume Simmons' rights, he must also assume Simmons' responsibilities. Simmons made a knowing and intelligent decision to waive his right to a direct appeal (J.A. 31). Since Whitmore wishes to assume Simmons' rights, he must also assume Simmons' responsibilities – the knowing and intelligent waiver of the direct appeal. Whitmore asserts that Simmons cannot waive the Eighth Amendment claim because it is a "public right" (Brief, p. 18). Of course, if that assertion were true, then Simmons has no private right to assert, and no private right to be assumed by Whitmore under a third-party standing theory.

C. Supreme Court review of the Eighth Amendment claim is precluded by an adequate and independent state ground.

On March 13, 1989, the Arkansas Supreme Court found that Whitmore "has failed to show that he has standing to intervene in this cause" (J.A. 34). The Arkansas Supreme Court found, as a matter of Arkansas state law, that Whitmore was not entitled to intervene in the state-court proceeding. That decision constitutes a short and plain statement of an adequate and independent state ground supporting the judgment of the Arkansas Supreme Court. *See, Michigan v. Long*, 463 U.S. 1032 (1983).

District Judge Eisele noted the state-law nature of the 1988 Arkansas Supreme Court's ruling when he wrote:

> Petitioner Franz's claim that he has standing under the Arkansas Constitution to prosecute these issues in Arkansas state court was rejected by the Arkansas Supreme Court, and in any case could not avail him before this Court, because he must meet federal, not state, standing requirements.

Franz v. Lockhart, 700 F.Supp. at 1010. Indeed, the Arkansas Supreme Court noted the criticism of the federal "next-friend" standing standard and instituted a less stringent standard for "next-friend" standing in Arkansas (J.A. 12). Whitmore, however, failed to satisfy that lesser standard. Since the Arkansas Supreme Court relied upon the adequate and independent state ground – Whitmore's lack of standing to proceed under Arkansas law – the judgment of the Arkansas Supreme Court should be affirmed. *Cf. id.* at 1010 n. 1.

CONCLUSION

The concepts of standing: "next friend," individual and third-party, in death-penalty litigation have been the subject of controversy over the past twelve years. The Court should take the opportunity presented in the present case and provide guidance for the lower courts.

Respectfully submitted,

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